

## ***Back Door to Prohibition The New War on Social Drinking***

by Radley Balko

### **Executive Summary**

December 2003 marks the 70th anniversary of the Twenty-First Amendment, which repealed alcohol prohibition in the United States. The 13 years between the passage of the Eighteenth and Twenty-First Amendments saw the alcohol trade go underground, bringing with it all the ancillary crime that comes with a black market. Alcohol abuse in the United States went up, not down, and civil liberties and tax dollars were sacrificed to what amounted to a grand, failed experiment in state-enforced morality.

One would think that, given the failure of Prohibition, Americans wouldn't need to worry about its return. That may not be the case. A well-funded movement of neoprohibitionists is afoot, with advocates in media, academia, and government. The movement sponsors a variety of research organizations, which publish dozens of studies each year alleging the corruptive effects of alcohol. Those studies are taken at face value by well-intentioned policymakers at the local, state, and federal level. New laws are enacted that curb Americans' access to alcohol.

Some of those laws aim to make alcohol less available through taxation schemes, others through strict licensing or zoning requirements,

still others by censoring alcohol advertisements. State and federal government officials have also sought to curb alcohol abuse from the demand side, but such efforts ultimately prove misguided. The 2000 federal law that encouraged local officials to lower the legal threshold for drunken driving, for example, will have little effect on public safety. Instead, it shifts law enforcement resources away from catching heavily intoxicated drunk drivers, who pose a risk, to harassing responsible social drinkers, who don't.

Taken together, the well-organized efforts of activists, law enforcement, and policymakers portend an approaching "back-door prohibition"—an effort to curb what some of them call the "environment of alcoholism"—instead of holding individual drinkers responsible for their actions. Policymakers should be wary of attempts to restrict choice when it comes to alcohol. Such policies place the external costs attributable to a small number of alcohol abusers on the large percentage of people who consume alcohol responsibly. Those efforts didn't work when enacted as a wide-scale, federal prohibition, and they are also ineffective and counterproductive when implemented incrementally.

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## Introduction

From January 17, 1920, to December 5, 1933, America experimented with the prohibition of alcohol. When the Eighteenth Amendment was ratified on January 16, 1920, it was the culmination of a well-funded, well-organized, multifaceted anti-alcohol effort that was more than 100 years in the making.

Though the various organized temperance movements date back to well before the Civil War, the initial political success of prohibition can largely be credited to the grassroots efforts of two organizations, the Women's Christian Temperance Union and the Anti-Saloon League.<sup>1</sup> Those two organizations and their supporters initially took their case for a dry society to state and local governments, attempting to persuade cities, counties, and states to use more discretion in the licensing of saloons.<sup>2</sup> Some of those advocates called for higher taxes on beer, wine, and liquor (others didn't, because they viewed excise taxes as state endorsement of alcohol).<sup>3</sup> Others sought to ban alcohol near churches, schools, and public buildings. That incremental approach to temperance won converts city by city, county by county. Federal prohibition might never have happened without it. By 1900 a dry foundation had been laid—nearly one in three Americans lived in a jurisdiction that prohibited alcohol.<sup>4</sup> By 1913 that number jumped by half; nine states were entirely dry, and an additional 31 granted cities and counties the option of going dry on their own.<sup>5</sup>

Those provincial legislative successes came only after concerted efforts to win hearts and minds to the dry cause. Here, too, the prohibitionists employed a multifront effort. They regularly invoked alcohol's devastating effects on children—one of the WCTU's earliest victories was to compel public schools to teach the purportedly dire health consequences of regular alcohol consumption.<sup>6</sup> They used dubious science to support their cause—prohibitionist literature warned that alcohol could trigger every conceivable human malady, from dysentery to spontaneous combustion.<sup>7</sup>

Temperance advocates also appealed to corporate America. Henry Ford signed on to the cause after dries convinced him that the saloons were sapping his workers' productivity.<sup>8</sup> The prohibitionists preached the evils of alcohol from the pulpit, taught them in the schoolhouse, and filibustered from the statehouse. When they needed a final push, some turned to ethnic demagoguery. The onset of World War I provided ample opportunity for the dries to exploit stereotypes of hard-drinking Germans and Italians to garner support for a constitutional amendment.<sup>9</sup>

Prohibition itself, of course, was a catastrophic failure. It took about three years for a black market bootlegging industry to find its footing, but by the mid-1920s Americans were drinking as much alcohol as they were immediately before the ratification of the Eighteenth Amendment.<sup>10</sup> More people were drinking and drinking more at each sitting, and they were drinking dangerous liquor manufactured by amateurs who did not always know what they were doing.

Corruption ran rampant, from the most provincial city and county law enforcement officials all the way up to the U.S. House of Representatives, which housed its own stock of bootlegged liquor,<sup>11</sup> and to the Department of Justice, where President Warren Harding's attorney general, Harry Daugherty, became the administration's corrupt point man for bootleggers.<sup>12</sup> Many politicians blatantly supported prohibitionist policies while regularly imbibing themselves. The prohibition movement was well aware of the duplicity but was willing to grant its most public supporters immunity in exchange for needed political patronage.<sup>13</sup>

Though temperance advocates often cited the plight of women and children in the campaign for the Eighteenth Amendment, its enactment had the effect of introducing an entire generation of American women to alcohol. More women drank during the 1920s than ever before, and both men and women began drinking at a younger age.<sup>14</sup> By the mid-1920s deaths, illnesses, and hospitalizations due to drinking soared, as more potent, less

scrupulously brewed liquor flooded the black market.<sup>15</sup> Some observers credited Prohibition with the popularity of the cocktail, which evolved as drinkers were forced to dilute harsh underground libations to make them palatable.<sup>16</sup>

The great journalist and humorist H. L. Mencken wrote in 1925: “Five years of Prohibition have had, at least, this one benign effect: they have completely disposed of all the favorite arguments of the Prohibitionists. None of the great boons and usufructs that were to follow the passage of the Eighteenth Amendment has come to pass. There is not less drunkenness in the Republic, but more. There is not less crime, but more. There is not less insanity, but more. The cost of government is not smaller, but vastly greater. Respect for law has not increased, but diminished.”<sup>17</sup>

Given that bitter 13-year experience, one would think that America had learned its lesson: that the grand jazz-age experiment in social engineering had failed so miserably and completely that policymakers would never be inclined to attempt it again. Unfortunately, that’s not the case. There’s a new anti-alcohol fervor afoot. It began with a laudable 20-year nationwide campaign against drunken driving that has since gone awry. State legislatures, municipalities, and some segments of the federal government have rediscovered a strong distaste for alcohol. Like its early 20th-century forebears, today’s anti-alcohol movement, or neoprohibitionism, is well funded, nonpartisan, and well versed in public relations.

It’s also been fairly successful. Though a return to formal prohibition seems farfetched, a slightly modified, “back-door” prohibition is certainly feasible and probably already within reach. The new temperance movement has pushed for—and won—a wide range of anti-alcohol initiatives across the country, including higher taxes on alcohol; zoning laws that restrict taverns and bars or limit their concentration in certain areas; bans and severe restrictions on alcohol advertising; and aggressive drinking and driving laws that are aimed not at rounding up seriously inebriated drivers

who threaten highway safety but at putting the fear of a drunken driving arrest into social drinkers, most of whom can responsibly mix a drink or two over dinner with the drive home. The aim of the neoprohibitionist movement seems to fall short of constitutionally mandated sobriety. Rather, the neoprohibitionists seem more interested in inconveniencing social drinkers, embarrassing them, and threatening them with draconian drinking and driving laws to the point where consuming alcohol away from home just isn’t worth the hassle.

In a RAND study that’s something of a milestone for the modern temperance movement, Deborah Cohen and others concluded that the “magnitude of alcohol-related health problems in a population is directly related to per capita consumption.”<sup>18</sup> Cohen and her coauthors recommended “controlling access to alcohol, penalties for violations of liquor laws, stricter licensing requirements and random sobriety checkpoints.”<sup>19</sup> Those policy prescriptions succinctly summarize the goals of the neoprohibitionists: control the *environment* of alcohol and alcoholism and shift the focus away from alcohol abusers themselves. If enough restrictions are placed on access to alcohol, the thinking goes, society at large will free itself from the external costs of drunkenness. Indeed, Cohen told the *Dallas Morning News*, “It’s easier to control the providers than it is the consumers.”<sup>20</sup>

The success of the new temperance movement is all the more remarkable considering the panoply of medical studies released over the past several years touting the health benefits of moderate alcohol consumption.<sup>21</sup> In a December 2002 article in the *New York Times*, reporter Abigail Zuger summarized dozens of studies on alcohol and human health, including large population studies of 80,000 American women, thousands of Danish men, and more than 100,000 adults in California. Zuger writes: “A drink or two a day of wine, beer, or liquor is, experts say, often the single best nonprescription way to prevent heart attacks—better than a low-fat diet or weight loss, better even than vigorous exercise.

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Moderate drinking can help prevent strokes, amputated limbs and dementia.”<sup>22</sup> According to Dr. Curtis Ellison, a professor of medicine and public health at the Boston University School of Medicine, “The science supporting the protective role of alcohol is indisputable; no one questions it anymore. . . . There have been hundreds of studies, all consistent.”<sup>23</sup>

Other studies have shown that moderate alcohol consumption reduces the risk of Type 2 diabetes<sup>24</sup> and stiffening of the arteries<sup>25</sup> and that wine reduces the risk of prostate cancer,<sup>26</sup> pulmonary events,<sup>27</sup> second heart attacks,<sup>28</sup> skin cancer,<sup>29</sup> and even the common cold.<sup>30</sup> In 1994 the *Journal of the American Medical Association* estimated that as many as 80,000 American deaths could be prevented each year by moderate alcohol consumption.<sup>31</sup>

Yet even with all of this heartening new research, a handful of organizations are still pushing the ideas (also contrary to available evidence) that too many Americans are drinking too much, that the alcohol industry is targeting binge drinkers and underage consumers, and that all of this has heavy costs for the U.S. economy. As we mark 70 years since the repeal of Prohibition in America, perhaps it is time to survey how policymakers are using taxation, censorship, zoning restrictions, and other police powers to curb freedom and “engineer” America’s alcohol behavior.

## **Taxation**

In September 2003 a panel of the National Academy of Sciences’ Institute on Medicine released a report titled *Reducing Underage Drinking: A Collective Responsibility*.<sup>32</sup> Congress commissioned the report at a cost of \$500,000.<sup>33</sup>

The report concludes that underage drinking is a devastating problem, costing the U.S. economy some \$51 billion per year. It urges policymakers to increase taxes on alcohol products, including tripling the taxes on beer, because “beer is the most popular form of alcoholic beverage by a large margin. . . . [S]tate and federal excise taxes are potentially impor-

tant instruments for preventing underage drinking and its harmful consequences.”<sup>34</sup>

The report further recommends a special federal task force on underage drinking that will identify trends and loyalties toward favored brands and varieties of alcohol among underage drinkers, brands that will then presumably be subject to further federal penalties, including additional taxation.<sup>35</sup>

For years activist and advocacy groups such as the Center on Addiction and Substance Abuse, Mothers Against Drunk Driving, the Center for Alcohol Marketing to Youth, and the Center for Science and the Public Interest have called for increasing taxes on liquor at the local, state, and federal level. In a down economy, when state legislatures and local governments are looking for new revenue streams to close budget gaps, higher taxes on liquor are apparently perceived to be politically painless.

- In Indiana the state legislature is considering raising alcohol taxes by 50 percent.<sup>36</sup>
- The mayor of Pittsburgh, Pennsylvania, has proposed a 10 percent city tax on alcohol, a move supported by the state’s governor, Ed Rendell, who pushed a similar proposal while he was mayor of Philadelphia. Rendell also proposed tripling the state tax on beer.<sup>37</sup>
- In Nevada the legislature has considered doubling alcohol taxes. State Assembly Minority Leader Lynn Hendrick said of the proposal: “This will be easy. Nobody has a problem with sin taxes.” Gov. Kenny Guinn signed a bill increasing alcohol taxes 75 percent.<sup>38</sup>
- In 2002 Alaska, Tennessee, and Puerto Rico all increased their excise taxes on beer, wine, or alcohol.<sup>39</sup>
- In 2003 Arkansas, Idaho, Nebraska, Nevada, Washington, and Utah increased their excise taxes on liquor as well.<sup>40</sup>
- Additional alcohol tax legislation is currently pending in Alabama, Arkansas, Connecticut, Georgia, Idaho, Indiana, Kansas, Massachusetts, Michigan, Mis-

souri, Minnesota, Nebraska, Nevada, New York, North Carolina, Oregon, South Carolina, Utah, Vermont, and West Virginia. Additional proposals were introduced in 12 states but either failed or died before coming to a vote.<sup>41</sup>

Generally, those tax bills are sold on the idea that an increase in alcohol taxes will decrease consumption, particularly among underage drinkers, and thus cut down on the external costs associated with alcohol abuse, just as the NAS study suggested. Newspaper editorials and legislators then cite the alarming studies about underage and binge drinking when advocating the tax hikes.

There are several reasons why the stated policy rationale for increased taxation should be viewed with skepticism. First, the assertion that underage and binge drinking are “on the rise” is questionable. The premise usually rests on a series of reports published in the last several years by Columbia University’s Center on Addiction and Substance Abuse. One of the reports, titled “Teen Tiplers,” claimed that underage drinking was responsible for one-quarter of all alcohol consumption in the United States.<sup>42</sup> The study was later proven faulty, as it was taken from a federal survey of substance abuse habits that oversampled teenagers. The actual number is closer to 11 percent.<sup>43</sup>

Another report from CASA claimed that half of alcohol sales are to youth and adults who drink excessively.<sup>44</sup> That study was later criticized by the National Centers for Disease Control and Prevention, which said CASA had misinterpreted the results of a CDC survey of high school drinking rates.<sup>45</sup> Still another CASA study, this one in 1994, declared that college binge drinking had reached “epidemic proportions” and that binge drinking among college women had tripled in 10 years.<sup>46</sup> *Forbes Media Critic* criticized this study, too, finding that its conclusions were based on conjectures offered by health educators at universities, not on actual survey data.<sup>47</sup>

Studies such as those published by CASA are generally accompanied by aggressive pub-

lic relations campaigns. Their conclusions are too often accepted uncritically by media outlets, opinion leaders, and policymakers around the country. In a December 2002 editorial recommending the 50 percent hike in Indiana’s alcohol taxes, for example, the *Indianapolis Star* wrote: “The biggest dividend would go to children. Research shows the greatest impact from raising alcohol taxes is a reduction in alcohol consumed by minors.”<sup>48</sup>

In truth, underage drinking has been falling since the early 1980s.<sup>49</sup> According to the National Institute on Alcohol Abuse and Addiction, the percentages of high school students reporting they have had a drink in their lifetimes, in the previous year, in the previous 30 days, and daily have all fallen significantly since 1980.<sup>50</sup> The percentage reporting they have consumed five or more drinks at one sitting in the previous two weeks has also fallen steadily.<sup>51</sup> The trend has been similar among eighth graders and sophomores (though less significant among the latter) ever since NIAA began surveying the latter two groups in 1991.<sup>52</sup>

Intuition alone suggests that underage drinkers aren’t likely to be dissuaded by hikes in the prices of beer or wine. As the NAS study notes, young people today prefer beer, but only because it is inexpensive. Increasing the price of beer will only steer young people toward the next least expensive option. Furthermore, the idea that teens and young adults are cost conscious is dubious at best, given the ample evidence of their preference for brand names, trends, and peer acceptance. States such as Florida and Alaska, which have the highest excise taxes on beer, have shown no signs of a corresponding decrease in underage drinking.<sup>53</sup> One of the NAS study’s own panelists, Dr. Philip J. Cook of Duke University, wrote as recently as 1999 that “the scholarly consensus on the public-health benefits of alcohol excise taxes appears to have broken down in recent years.”<sup>54</sup>

Indeed, a 1999 study by T. S. Dee in the *Journal of Public Economics* found that beer taxes have no statistically significant effect on college and teen drinking.<sup>55</sup> Dee’s methods

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differed from those used in earlier research. Dee focused on in-state variations in beer taxes as opposed to cross-state variations, on the theory that differences between the states might be more attributable to cultural attitudes toward alcohol than to the imposition of excise taxes. His results supported his theory. Beer tax rates within individual states had no significant effect on underage drinking.

State and city governments have long levied hefty taxes on tobacco products under a similar theory—that decreasing the availability of cigarettes will likewise decrease demand. There's some evidence that that's the case, at least when cigarettes are taxed at very high rates, such as the \$3 per pack tax in New York City. But, in order to have a significant impact, the tax hikes need to be steep, which then spawns black markets and the ancillary crime that comes with illegal markets. In New York City the bootleg cigarette market has thrived for decades, diverting millions of dollars from lawful businesspeople and into the pockets of criminals.<sup>56</sup>

There are other negatives to excise taxes as well. Alcohol taxes are regressive, falling disproportionately on the poor, who spend a greater percentage of their income on alcohol. According to David Rehr, president of the National Beer Wholesalers Association, half of all beer in the United States is sold to people who make less than \$45,000 per year.<sup>57</sup> The Congressional Budget Office reports that tobacco excise taxes have actually become more regressive over time, as middle- and upper-income earners tend to quit smoking at a greater rate than do low-income earners once tax hikes go into effect.<sup>58</sup>

Excise taxes also unfairly force all drinkers to pay for the societal costs attributable to a small number of drinkers who abuse alcohol. The taxes are often passed under the justification that they'll offset the negative externalities caused by excessive alcohol consumption—health care costs, the costs of policing drunken drivers and treating their victims, the costs of domestic abuse and physical violence caused by excessive drinking, and so forth. But common sense suggests that the

addicts and alcoholics who contribute most to external costs are those *least likely* to quit the habit as a result of the imposition of an excise tax.

Instead, the people most likely to change their habits because of higher taxes are moderate and social drinkers, a point the NAS study concedes: “[T]he most ‘cost-effective strategy to reduce underage drinking’ includes policies that produce their main effects not on underage drinking, but rather on the overall level of drinking in the population.”<sup>59</sup>

Excise taxes are being “sold” as a solution to a problem (surges in binge and underage drinking) that may not exist. Moreover, the taxes are a remedy that probably won't work, and they carry with them the added burdens of penalizing lower-income workers and creating black markets. Unfortunately, budget woes in state and city government keep alcohol taxes on the table.

## Censorship

The campaign against alcohol seeks to expand censorship precedents that have already been established for tobacco products. A September 2003 *Christian Science Monitor* editorial says: “Congress banned cigarette advertising from television and radio altogether, beginning in 1971. Doing the same with alcohol would be a good start.”<sup>60</sup> The editorial ran in response to a Federal Trade Commission report that an uncomfortable amount of alcohol advertising is reaching underage audiences.<sup>61</sup> In response, the alcohol industry agreed to limit its advertising to media for which the underage audience is typically 30 percent or less of the total audience.<sup>62</sup>

The *Christian Science Monitor* isn't alone.

- In a strategy conference hosted by the Educational Development Center in Boston this year, a bevy of anti-alcohol advocacy organizations recommended banning all radio, television, and print alcohol advertising.<sup>63</sup>
- The CASA “Teen Tiplers” study men-

tioned earlier was released just as the NBC television network was considering allowing liquor companies to run commercials during some of its programming. Rep. Frank Wolf (R-VA) and 12 other members of Congress sent a letter to NBC promising regulatory retaliation if the network went through with its plans. "We would hate to see your network become the object of a public backlash against network hard-liquor advertising or the reason that Congress steps in to protect the public interest and public airwaves by setting up a federal regulatory system for network advertising," the letter said.<sup>64</sup>

- After a study by the Center for Alcohol Marketing to Youth criticized the alcohol industry for targeting its advertising at underage drinkers (including advertising on television programs that air during the school day and, in some cases, as late as 11 p.m. or midnight),<sup>65</sup> Sens. Mike DeWine (R-OH) and Christopher Dodd (D-CT) issued a joint press release announcing their "intention to monitor underage drinking trends and the extent to which alcohol industry advertising is reaching underage youth." "We intend to hold advertisers accountable," Dodd said. "Our families and our children in Connecticut and Ohio and all across the nation deserve better."<sup>66</sup>
- In their 1996 book *Body Count*, former drug czar William J. Bennett, former White House aide John J. DiIulio Jr., and current drug czar John P. Walters have a section titled "Restricting Alcohol, Cutting Crime." In their proposal to limit the negative externalities of alcohol abuse, the authors advocate making "strong efforts to limit alcoholic beverage advertising." They write, "The alcohol industry seems perfectly well aware of the relationship among alcohol, disorder and crime—and in some infamous cases, has been quick to exploit it for commercial gain."<sup>67</sup> Instead of calling for an outright ban on billboards advertisements the

authors seek to accomplish the same end indirectly by enforcing limits on billboard advertising of alcohol and banning alcohol ads "from the *horizons* of schools, churches, and public housing centers."<sup>68</sup>

In 1999 the Bureau of Alcohol, Tobacco and Firearms approved a proposal from winemakers to include "directional" health statements on wine labels, which advised consumers to contact their personal physicians or consult government agencies to learn more about recent research indicating the health benefits of moderate alcohol consumption. Two statements were allowed only after a litany of negative warnings about alcohol use and were hardly ringing endorsements. One said, "Alcoholic beverages have been used to enhance the enjoyment of meals by many societies throughout human history," and the other said, "Current evidence suggests that moderate drinking is associated with a lower risk for coronary heart disease in some individuals."<sup>69</sup> Allowing the new labels made sense because at the time, despite recent research touting the health benefits of wine, polls showed that most Americans were still unaware of them.<sup>70</sup>

But in 2003, after heavy lobbying from anti-alcohol groups, the BATF successor agency in charge of alcohol, the Federal Tax and Trade Bureau, effectively negated BATF's 1999 ruling, decreeing that directional health statements could not be included on wine labels without additional disclaimers about the negative effects of alcohol consumption. The Center for Science in the Public Interest hailed the ruling, writing in a press release, "Although a blanket ban on all health claims and health-related statements would have been preferable, we believe the regulations effectively shut the door to industry efforts to promote the healthfulness of drinking."<sup>71</sup>

A 2003 poll by the Institute of Social Research at the University of Michigan found that 80 percent of respondents thought the health drawbacks of alcohol consumption far outweighed the benefits, and 44 percent thought the government was doing too little

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to regulate alcohol.<sup>72</sup> Another poll by the American Beverage Institute taken in 1998 found 55 percent of respondents agreeing that the spirits industry is a “harm” or “great harm” to society. Half thought the same of the beer industry.<sup>73</sup>

By preventing the alcohol industry from communicating the health benefits of its products, anti-alcohol groups and government agencies ensure that public debate about alcohol and public health will be dominated by anti-alcohol groups and government agencies. Keeping the public ignorant of alcohol's health benefits obviously makes it easier to enact policies that restrict the public's access to alcohol. The point here is a very modest one: “Self-serving” statements from the liquor industry are *not* automatically false. And statements from “public health” activists are not automatically true.

There's evidence that the strategy of suppressing positive information does affect the political climate. A December 2002 survey by the Alcohol Epidemiology Program at the University of Minnesota, for example, found that 70 percent of respondents favor outright bans on “youth-oriented” alcohol packaging, 67 percent favor banning liquor commercials on television, 62 percent favor banning “alcohol marketing with athletes,” and 61 percent favor banning all billboard advertisements of alcohol.<sup>74</sup> The billboard ban idea in particular has found resonance in cities across the country and has been the subject of several court battles. On its website, the Alcohol Epidemiology Program recommends that proponents of billboard bans cite poll statistics to get around objections from detractors.<sup>75</sup>

Not surprisingly, several cities have converted those recommendations and survey results into policy.

- In 1998 the city of Oakland, California, adopted an ordinance prohibiting alcohol advertising within three blocks of any recreation center, church, or day care facility. The ordinance left only 70 of the city's 1,450 billboards available for alcohol advertising.<sup>76</sup>

- The city of San Diego passed a similar ordinance, removing over half of the city's billboard space from use by beer and alcohol industry firms.
- Baltimore has banned the advertisement of alcohol or tobacco in any “publicly visible location.”<sup>77</sup>
- Chicago, adopted an ordinance based on Baltimore's model.<sup>78</sup>
- Los Angeles, Washington, DC, Seattle, and Albuquerque are considering, but haven't yet adopted, the Baltimore model.<sup>79</sup>

Just how those bans will hold up to First Amendment scrutiny isn't yet clear. The Baltimore ban was upheld by a federal appellate court in 1994.<sup>80</sup> In *Anheuser-Busch v. Schmoke*, the Fourth Circuit Court of Appeals held that restrictions on commercial speech were allowable under the First Amendment so long as the restrictions were narrowly drawn to address a substantial government interest, as outlined in the landmark commercial speech case *Central Hudson Gas and Electric v. Public Service Commission*.<sup>81</sup> The court held that the city of Baltimore's interest in minimizing the external effects of alcohol was substantial and that the restrictions banning certain substances from billboard ads were narrow enough to satisfy the First Amendment. The U.S. Supreme Court declined to hear an appeal from Anheuser-Busch.<sup>82</sup>

However, in the 1996 case *44 Liquormart, Inc. v. Rhode Island*,<sup>83</sup> the Supreme Court overturned a Rhode Island law banning offsite advertising of alcohol prices. Rhode Island officials maintained that the ads would drive down the price of alcohol and that there was a compelling state interest in preventing increased consumption. Hence, the state conceded that the chief aim of the ad moratorium was not to address any “externality” related to alcohol abuse. Rather, the chief aim was to diminish the *lawful* consumption of alcohol.

The Supreme Court held that a state must meet a heavy burden in prohibiting commercial speech relating to a legal activity and that the state's interest in limiting alcohol consumption wasn't sufficient to justify an out-

right ban. In a concurring opinion, Justice Clarence Thomas went even further. Thomas wrote that Rhode Island's "asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," and that in such cases "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech."<sup>84</sup>

Most recently, in April 2003 the U.S. Court of Appeals for the Sixth Circuit struck down a Cleveland city ordinance that banned alcohol billboard advertisements in residential areas and limited them to a few designated districts within the city.<sup>85</sup> However the courts come down on the constitutionality of bans on alcohol advertising, civil libertarians ought to be disturbed by the latest efforts to curb a *legal* industry's efforts to promote its product. The most prominent advocates of billboard bans and restrictions on alcohol advertising on TV and radio and at sporting events have made no secret of their intent to follow the example set by similar bans on tobacco products. Sandy Golden, a spokesperson for the Campaign for Alcohol-Free Kids, has said, "We're 10 to 15 years behind the tobacco people, and we want to close the gap."<sup>86</sup>

Rhode Island's defense of its ban on alcohol advertising could not have been more clear. The aim of measures enacted to limit the scope and reach of alcohol advertising is, simply, to depress the consumption of alcohol. In a free society, politicians should not concern themselves with the diets of their constituents. At most, the surgeon general might issue a report to prove that orange juice improves health but that, say, chewing gum is detrimental to health. Ultimately, however, Americans ought to make up their own minds about what they eat and drink, without the social engineering schemes of politicians.

## Police Powers

Perhaps the boldest front on which the neoprohibition effort has been moving is

drunk driving—or, more accurately now, *drinking* and driving. Since the early 1980s, organizations such as Mothers Against Drunk Driving have waged aggressive, high-profile, ubiquitous campaigns to raise public awareness of a formidable threat to public safety that far too few people take seriously.

The campaign was enormously successful. Alcohol-related traffic deaths have dropped by 40 percent since 1982,<sup>87</sup> even as non-alcohol-related traffic fatalities have increased by 39 percent.<sup>88</sup> The total number of victims of drunk drivers has stabilized since the mid-1990s.<sup>89</sup> The percentage of drivers who had blood alcohol levels above the legal limit dropped from 27 percent in 1991 to 21 percent in 2001.<sup>90</sup> Among underage drivers—often cited by temperance advocates as a reason to restrict access to alcohol—there was a similar decrease. The number of drivers involved in fatal accidents who were intoxicated dropped by 24 percent between 1991 and 2001.<sup>91</sup>

In short, attitudes have changed. Today's drunk driver is a pariah. It is no longer socially acceptable to stagger out from a pub and slip behind the wheel. Chuck Hurley, a spokesman for the National Safety Council—which advocates tougher drinking and driving laws—has said: "We've already deterred virtually all of the social drinkers. We're now down to the hard core of people who drink and drive in spite of public scorn."<sup>92</sup> Former MADD president Katherine Prescott agreed, telling the *New York Times* that the problem "has been reduced to a hard core of alcoholics who do not respond to public appeal."<sup>93</sup> Unfortunately, those conclusions seem to run counter to the policies being pushed by Hurley and Prescott's organizations, as well as the other key players in the temperance movement. And, increasingly, those policies are finding warm receptions in state legislatures.

In 2002 and 2003 alone, more than 100 new pieces of legislation further restricting already stringent drinking and driving parameters were introduced in 31 different states.<sup>94</sup> Some of those laws were reasonable, of course—increasing fines for repeat offend-

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**“Alcohol-related” fatalities include accidents in which a drunk driver was killed by the negligence of a sober driver, a drunk passenger was killed in a car driven by or hit by a sober driver, or a drunk pedestrian was killed by a sober driver.**

ers, for example. But others attempted to strip drunk driving suspects of legitimate criminal protections. One law introduced in Virginia attempted to do away with the practice of making a blood sample available to the defendant for independent testing after a first sample used by law enforcement revealed an illegal level of intoxication.<sup>95</sup> Laws like these find support from the public because temperance advocates and their supporters in government have been enormously successful in propagating the idea that drunk driving still poses an increasing threat to public safety, despite the figures cited above.

One example of how those advocating tougher drinking and driving laws have manipulated data is the touting of a figure they call “alcohol-related fatalities.” The National Traffic Highway Safety Administration uses this number each year in its Fatality Analysis Reporting System.<sup>96</sup> The problem with the term “alcohol-related,” however, is that it’s based on statistical modeling and creates an impression among the public that’s at odds with what it actually represents. Most hear “alcohol-related fatalities” and assume “fatalities caused by drunk drivers.” In truth, “alcohol-related” fatalities include any accident in which alcohol was even remotely involved.

“Alcohol-related” fatalities include accidents in which a drunk driver was killed by the negligence of a sober driver, a drunk passenger was killed in a car driven by or hit by a sober driver, a drunk pedestrian was killed by a sober driver, and even all of the previous scenarios when the actors weren’t even legally drunk but had merely consumed any amount of alcohol at all.<sup>97</sup> The number can even include accidents in which there’s no evidence of alcohol but under circumstances in which alcohol is commonly involved, such as a lone driver crashing his car in the early hours of the morning.<sup>98</sup>

In 2001 NHTSA claimed 17,448 people were killed in alcohol-related traffic accidents.<sup>99</sup> A *Los Angeles Times* investigation conducted in December 2002 looked at that number, looked at a sampling of accident

reports, and dismissed NHTSA’s statistical modeling mechanism. Disallowing for the myriad scenarios in which it couldn’t be conclusively proven that a drunk driver’s negligence was to blame, the *Los Angeles Times* found that about 5,000 of those 17,448 traffic deaths in 2001 involved a sober person killed by a drunk driver. The investigation detailed one accident in Aliceville, Alabama, where a state trooper merely suspected that a driver had been drinking. Though no alcohol test was ever performed, and the family of the victim later contended in a lawsuit that the accident was the result of a rollover defect, the fatality was still attributed to alcohol by NHTSA.<sup>100</sup>

Perhaps most revealing of the campaign against social drinking is the way the language of public officials and anti-alcohol advocates has changed. “Drunks” have been replaced by “drinkers,” “drunk driving” by “drinking and driving.” It’s a subtle change, but a significant one. Attempting to demonize the mix of driving with *any* amount of alcohol consumption is a clear departure from a campaign focused on highway safety. It is an effort to more generally change the drinking behavior of Americans. No drinking and driving means no beer or two at the ballgame before coming home, no after-dinner Irish coffee, no glass of wine with a dinner out. Consider:

- A series of taxpayer-funded radio ads in Washington, DC, told motorists, “If you’re still drinking and driving, the new [lower blood-alcohol threshold] law is aimed right at you. Never drink and drive.”<sup>101</sup>
- A joint campaign undertaken by MADD and the U.S. Department of Transportation was titled “You Drink & Drive. You Lose.” U.S. Transportation Secretary Norm Mineta said during the campaign: “If you drink and drive, you lose. If we catch you drinking and driving, we will arrest you and prosecute you.”<sup>102</sup>
- At that same campaign kickoff, William B. Berger, former president of the

International Association of Chiefs of Police, declared, “We will not allow a man or woman to leave [a sobriety checkpoint] knowing they consumed alcohol.” Note Berger’s choice of words—not that “they are drunk,” merely that “they consumed alcohol.”<sup>103</sup>

- DOT also released to local law enforcement officials a kit of information on how to initiate the details of the campaign. “The campaign’s message is a simple one,” the kit says, “don’t drive after drinking alcohol. . . .”<sup>104</sup>
- The American Beverage Institute conducted a survey of driver manuals at various state departments of motor vehicles. California, for example, scolds that “one drink can make you an unsafe driver.” Kentucky and Massachusetts say that “one drink will affect your driving.” Nevada warns, “There is no safe way to drive after drinking.” Oregon cautions, “ANY level of alcohol in your blood impairs to some degree your ability to drive.”<sup>105</sup>
- The state of Virginia just approved \$500,000 for a radio advertising campaign to air 22,000 total ads on 52 stations incorrectly telling listeners that “it’s illegal to drink and drive.”<sup>106</sup>

### **How Low Will It Go? Lowering the Blood Alcohol Concentration Level to .08**

The most prominent law that exemplifies the shift from “drunk driving” to “drinking and driving” was signed by President Clinton in 2000.<sup>107</sup> That federal law (frequently referred to as .08 per se) encouraged states to lower the legal blood alcohol concentration (BAC), measured in percentages, from .10 to .08. That means that, as of October 2003, drivers with a BAC of .08 or higher were automatically assumed to be intoxicated. Any state that does not make the policy change will lose federal highway funds.

Since that law went into effect, all but six states—Minnesota, Colorado, New Jersey, Delaware, Nevada, and West Virginia—have complied with the .08 mandate.<sup>108</sup> A few states

put up a fight. Iowa State Senate Majority Leader Steward Iverson called the federal .08 law “blackmail.” “Why is .08 the magic number? By lowering it to .08, we are going to catch more of what I call the social drinkers. I had two friends killed by drunk drivers, but we have to be realistic.”<sup>109</sup> Ohio State Senate President Richard Fenan told the *Los Angeles Times*: “The people who have had a few beers or a glass of wine are not the problem. We call it prohibition drip by drip. It is prohibitionists who want this. Their goal is zero tolerance.”<sup>110</sup>

The most obvious objection to .08 per se is that it does little to improve highway safety. It will of course increase the number of “drunk” driving arrests because it increases the pool of “drunks” by redefining what it means to be drunk, but there’s no significant evidence to suggest that removing drivers who register between .08 and .10 will save lives. In fact, the available evidence suggests otherwise:

- California was one of the first states to implement .08 per se, and a study conducted a year later by the state’s Department of Motor Vehicles found that the law’s “effect was primarily limited to individuals who generally restrict their alcohol consumption before driving anyway.”<sup>111</sup>
- California’s alcohol-related fatality rates did drop the first year .08 per se was implemented, but at a rate (6.1 percent) that was lower than the national average (6.3 percent).<sup>112</sup>
- Only 2 of the 10 states with the lowest traffic fatality rates in 2000 had at that time adopted .08 per se.<sup>113</sup>

Traffic fatality statistics offer further evidence of the futility of .08 per se:

- Two-thirds of the drivers in alcohol-related fatal accidents have a BAC of .14 or higher. The average BAC in fatal accidents involving alcohol is .17.<sup>114</sup>
- In the last 15 years, more drivers registering BAC levels of .01 to .03 caused fatal accidents than did drivers with

**Ohio State Senate President Richard Fenan told the *Los Angeles Times* “The people who have had a few beers or a glass of wine are not the problem.”**

**Lowering the legal BAC threshold from .10 to .08 does little to address the primary alcohol-related threat to highway safety—the hard drinkers who cause most of the accidents.**

BACs from .08 to .10.<sup>115</sup>

- A National Highway Traffic Safety Administration study of the first five states to adopt .08 per se measured the impact of the law in 30 different highway safety categories. States with .08 cumulatively got “safer” in 9 of the 30 categories but were unchanged or “less safe” in the remaining 21.<sup>116</sup>
- Looking abroad, Sweden has a BAC threshold of .02, yet the average BAC in alcohol-related fatal accidents there is still .15.<sup>117</sup>

To this day NHTSA claims that a nationwide .08 per se rule would save 500 lives per year, a number still cited by MADD<sup>118</sup> and other anti-alcohol groups across the country. The Clinton administration cited that number when promoting the federal .08 law.<sup>119</sup> Numerous state government agencies also cited that number in passing .08 laws before the 2003 deadline. But the 500 number is based on a study by longtime anti-alcohol activist Ralph Hingson, a former vice president of MADD.<sup>120</sup> In 1999 the U.S. General Accounting Office looked at Hingson’s report and his “500 lives saved” conclusion and declared it “unfounded.”<sup>121</sup>

The GAO has looked at several studies NHTSA has done on the effectiveness of .08 per se and concluded that “the evidence does not conclusively establish that .08 BAC laws by themselves result in reductions in the number and severity of crashes involving alcohol . . . NHTSA’s position—that the evidence was conclusive—was overstated.”<sup>122</sup> Yet NHTSA’s position on .08 per se continues to be the official position of the federal government, and its studies are still touted by state legislators, activists, and editorial boards that support .08, despite the GAO’s critical assessments.

The National Motorists Association reports another statistical fudge employed by MADD and NHTSA to promote .08 per se. Previously, BAC charts issued by both organizations showed .08 as the reasonable BAC a normal person could expect to hit after two or three drinks in an hour. NMA reports that

a new series of charts issued by MADD and NHTSA after the federal .08 law passed changed the scale a bit. The new charts say a 180-pound person needs *five* drinks to hit .08. But the new charts stretch the allotted time for those five drinks from one hour to three.<sup>123</sup> Nevertheless, when trying to convince a state legislator to lower BAC limits, it’s more persuasive to say a that 180-pound person needs five drinks to hit .08 than two or three because it allays concerns about criminalizing moderate social drinking.

The preponderance of the evidence, then, suggests that lowering the legal BAC threshold from .10 to .08 does little to address the primary alcohol-related threat to highway safety—the hard drinkers who cause most of the accidents. It’s akin to lowering the speed limit from 65 to 50 in order to catch people who regularly drive 100 mph. The new “criminals” really aren’t the problem, and targeting them diverts valuable law enforcement resources from catching the people who are.

In Minnesota lawmakers decided that the amount of money it would cost the state to prosecute drivers who weren’t a threat to public safety would exceed the amount of federal funding the state would forego by not adopting .08. State legislator Tom Rukavina told the *Los Angeles Times* that .08 per se would result in about 6,000 new criminal arrests at a cost of about \$60 million to the state.<sup>124</sup> That was more than Minnesota would give up from the federal government if it kept its .10 standard. Nevada legislators voted down .08 for similar reasons.<sup>125</sup>

Yet \$40 million of NHTSA’s \$225 million in highway traffic safety grants is specifically earmarked for “Alcohol-Impaired Driving Countermeasures Incentive Grants designed to encourage states to pass strong anti-drunk-driving legislation.”<sup>126</sup> An additional \$41 million of its operations and research budget is designated for “impaired driving deterrence.”<sup>127</sup> That is in addition to whatever portions of other budgetary items find their way to drunk driving deterrence programs. The *Los Angeles Times* estimates that the agency spends as much as \$300 million—more than

half its budget—on fighting drinking and driving.<sup>128</sup> Critics look at those numbers and question why NHTSA devotes so much of its budget to a problem that's been on the decline for a quarter century, while sober-driver highway fatalities far outnumber alcohol-related fatalities and have increased by nearly 40 percent in the last 20 years.

The .08 per se laws grow more absurd when one compares the amount of impairment that may be attributable to a .08 BAC with that caused by other activities motorists routinely engage in while driving:

- In 1997 the *New England Journal of Medicine* published a study concluding that drivers using cellular phones experienced the same amount of impairment as those with a BAC of .10.<sup>129</sup>
- A study by Britain's Transport Research Laboratory found that drivers using handheld phones had reaction times 30 percent slower than drivers impaired by a .08 BAC.<sup>130</sup> And an American Automobile Association study conducted in 2001 found that cellular phone use was less of a distraction to drivers than, among other things, having children in the back seat, eating while driving, or fumbling with a CD or radio tuner.<sup>131</sup>

Forty-five of the 50 states (plus the District of Columbia and Puerto Rico) have enacted laws requiring the suspension of drivers' licenses and even jail time for motorists who are no more impaired than most of us are on our commute to and from work, simply because the impairment happens to be induced by drinking instead of something less socially stigmatized.

And there's little reason to think the effort will stop at .08. Different people absorb alcohol into the bloodstream at different rates, but by most estimates a 120-pound woman can easily get to .08 by drinking two glasses of wine in two hours. If .08 doesn't represent significant driver impairment, it's troubling to think that the threshold could fall even lower. But statements from public officials

and anti-alcohol activists and some laws already enacted suggest movement in that direction:

- MADD Canada recently unveiled its campaign to initiate a .05 national standard. The organization conducted a poll showing that 66 percent of Canadians support the idea.<sup>132</sup>
- Minnesota DWI Task Force chairman Steve Simon said in 1997 that "ultimately, it [the BAC threshold] should be .02 percent."<sup>133</sup>
- The state of Michigan has set a BAC limit of .02 percent for any state officials on duty.<sup>134</sup>
- In North Royalton, Ohio, police can cite motorists with a "physical control violation" for the mere smell of alcohol in a vehicle.<sup>135</sup>
- Legislators in Arkansas and New Mexico have proposed .07 and .06 limits, respectively; and Delaware State Rep. William Oberle, when submitting his bill to move the state to .08, expressed his desire for "zero tolerance, like they have in Europe." An advocacy group also points out that at least six other states have considered legislation moving the BAC threshold below .08.<sup>136</sup>
- An editorial in Utah's *Deseret News* called for the state—which was the first to enact .08—to lower its BAC threshold to .02, not because it would make highways safer, but because it would effect a "cultural shift" in attitudes about alcohol.<sup>137</sup>
- Former Illinois state senator Robert Molaro says, "I think 40 years from now, our grandchildren and our great-grandchildren are going to say, 'You mean we used to let people have a beer or two and go drive a car?'"<sup>138</sup>
- California Sen. Barbara Boxer has said, "I see this country going to zero tolerance, period."<sup>139</sup>

The Department of Transportation is already working to build the case for zero tol-

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erance. In a recent DOT report, “Driver Characteristics and Impairment at Various BACs,” the agency concludes that “a majority of the driving public is impaired in some important measures at BACs as low as .02 percent.”<sup>140</sup> “Finally,” the report reads, “this laboratory study indicates that some important driving skills are impaired when there has been use of even small amounts of alcohol.”<sup>141</sup> MADD London has used the report to call for a .05 BAC limit in England.<sup>142</sup>

Many jurisdictions have in fact already enacted modified zero tolerance. For example, merely registering a BAC below .08 doesn’t always get a motorist off the hook. In several cities and counties across the country, police officers have the discretion to arrest drivers for “driving under the influence” if the driver merely admits to having consumed alcohol or *any* amount of alcohol is registered in a breath test. When that is combined with random sobriety checkpoints on roadways (a topic that will be discussed in more detail below), a motorist could have a beer or two, be well under .08, drive safely and responsibly, and *still* be subject to arrest for “driving under the influence” and all of the embarrassment, public disgrace, and damage to reputation that come with a criminal charge of mixing alcohol with driving.

In Florida police officers are permitted to arrest motorists they suspect are driving under the influence of alcohol, even if the motorists pass a breath test. In fact, even if a urine test later proves negative, the State Attorney’s Office could still press charges, based solely on the observations of police officers administering roadside sobriety tests.<sup>143</sup>

Until 1994 in Washington, DC, blowing .05 or lower was *prima facie* evidence that a motorist wasn’t driving under the influence of alcohol. That law has since changed.<sup>144</sup> Today, *any* positive reading on a breath test is enough for a police officer to consider arrest—in effect making the nation’s capital a zero tolerance jurisdiction.<sup>145</sup> In an op-ed, restaurant industry spokesman John Doyle writes about Willis Van Devanter, a 66-year-old man arrested at a sobriety checkpoint in Washington, DC, after

admitting to having two glasses of wine with dinner. He blew .03.<sup>146</sup> Such arrests rarely achieve convictions after full-blown trials, but even a simple arrest can seriously damage the reputations of public figures or ruin the careers of professionals such as teachers and school principals.

**Sobriety Roadblocks and the Constitution**

The most vital component of NHTSA and MADD’s 2002 joint “You Drink & Drive. You Lose” campaign is the establishment of “sobriety checkpoints”—a euphemism for roadblocks where police officers stop motorists without probable cause and administer breath tests.<sup>147</sup> Taken together with .08 per se and the fact that some jurisdictions leave “driving under the influence” (as opposed to “driving while intoxicated”) completely to the discretion of law enforcement officials at the roadblocks, random sobriety roadblocks are perhaps the most potent and far-reaching victory of the neo-prohibitionist movement. According to the MADD website, 39 states plus the District of Columbia now employ sobriety roadblocks in the ongoing campaign against drinking and driving.<sup>148</sup>

By their very nature, sobriety roadblocks are designed to catch motorists who aren’t driving erratically enough to otherwise be caught by law enforcement. And, as the studies mentioned above indicate, the odds are that if motorists are driving with BAC levels below .10, they aren’t impaired enough to be a significant threat to public safety, either.

NHTSA instructs local police departments to publicize the fact the checkpoints will be in place, a curious undertaking if the aim is to actually catch repeated hard-drinking drivers, as opposed to merely discouraging moderate drinkers from getting behind the wheel.<sup>149</sup> Indeed, the staunchest proponents of sobriety roadblocks admit that their intended and primary effect is to deter the social drinker, not to actually catch drunk drivers. In its instructions to local communities, the DOT writes, “Because only a small

percentage of the driving population is affected, most people will only know about sobriety checkpoints through word-of-mouth or media reports.”<sup>150</sup>

The problem, once again, is that roadblocks may indeed deter social drinkers, but social drinkers aren't the primary threat to public safety. What's worse, they occupy police officers and law enforcement resources that would be better spent pursuing the real threats to public safety—people who drive with BACs of .15 or higher and who are unlikely to be deterred by public relations campaigns announcing the initiation of roadblocks.

Some people might wonder how it is that police can stop a car without probable cause, force a breath test, and arrest a driver for operating a car under the influence. The answer: The U.S. Supreme Court has ruled that motorists don't have Fourth Amendment rights when it comes to sobriety roadblocks.<sup>151</sup> In *Michigan Department of State Police v. Sitz*, the Supreme Court overturned a Michigan Court of Appeals ruling that roadblocks violate the Fourth Amendment rights of motorists.<sup>152</sup> Writing for the majority, Chief Justice William Rehnquist reasoned that the magnitude of the drunken driving problem outweighed the “slight” intrusion on motorists “briefly” stopped at sobriety roadblocks.<sup>153</sup>

Part of the case Rehnquist made in determining the severity of the drunken driving problem, however, was again predicated on “alcohol-related” traffic fatalities; Rehnquist cited a claim that drunk drivers were responsible for more than 25,000 roadway deaths annually.<sup>154</sup> As noted earlier, those numbers grossly overestimate the actual number of sober individuals killed by the negligence of drunk drivers, meaning that in applying his balancing test Rehnquist seriously overstated the severity of the threat drunk driving poses to public safety.

This is a clear example of how NHTSA's fudging of numbers has had real-world policy implications. In the *Sitz* case, it played a part in abrogating the Fourth Amendment

rights of anyone with a driver's license. In his dissent, Justice John Paul Stevens pointed out that the net effect on highway safety of sobriety checkpoints is “infinitesimal and possibly negative.”<sup>155</sup> Stevens also questioned the supposedly “slight” intrusion on motorists indicated by Rehnquist, noting that “a Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion.”<sup>156</sup>

Justice Stevens was most penetrating, however, when criticizing the majority's disinterest in acknowledging “the citizen's interest in freedom from random, announced investigatory seizures.”<sup>157</sup> Noting that the real aim of checkpoints is to deter drinking by people who will never be stopped at them, Stevens described the roadblocks as “elaborate, and disquieting, publicity stunts. The possibility that anybody, no matter how innocent, may be stopped for police inspection is nothing if not attention getting.”<sup>158</sup>

After the Supreme Court's ruling in *Sitz*, the Michigan State Supreme Court took up the case and promptly found the same sobriety roadblocks to be in violation of the state constitution.<sup>159</sup> Three other state supreme courts have also found such roadblocks to be inconsistent with their state constitutions.<sup>160</sup>

Nevertheless, the *Sitz* precedent sanctioned roadblocks for any state interested in enacting them if the state supreme court would allow them. Interestingly, since *Sitz*, the Supreme Court ruled in 2000 that similar roadblocks set up to check for illicit drugs *are* in violation of the Fourth Amendment.<sup>161</sup>

Interesting, but not altogether surprising. For 20 years the courts have been carving out exemptions from constitutional safeguards when it comes to drinking and driving. As noted, drunk driving suspects have virtually no Fourth Amendment rights. Here are some other rulings to note:

- In 1983 the Supreme Court ruled that, when it comes to DUI suspects, the Fifth Amendment right against self-incrimination needs to be relaxed.<sup>162</sup>

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**In 2002 the Supreme Court of Wisconsin ruled that police officers can forcibly take blood samples from people who are suspected of driving under the influence.**

- In 1989, although the Sixth Amendment to the Constitution guarantees a jury trial for “all criminal prosecutions,” the Court ruled that there is no constitutional right to a jury trial in DUI cases, as long as the defendant isn’t subject to more than six months in jail.<sup>163</sup>
- In 2002 the Supreme Court of Wisconsin ruled that police officers can forcibly take blood samples from people who are suspected of driving under the influence. The court concluded that such warrantless blood draws from protesting, non-consenting adults were justified because “the dissipation of alcohol in the blood stream constituted an emergency.”<sup>164</sup> In 1998 a 33-year-old man by the name of Terry Jones died as a result of a struggle with police officers who were trying to forcibly draw a blood sample.<sup>165</sup>

As a result of those rulings, states have seized on the exemptions carved out for them by the courts at the urging of anti-alcohol groups. Forty-one states now have “administrative license revocation,” meaning DUI suspects can have their licenses rescinded before any trial has taken place.<sup>166</sup> Thirty-seven states have turned the Fifth Amendment safeguard against compelled self-incrimination inside out and impose *harsher* criminal penalties on those who refuse to take breath tests than on those who take them and fail.<sup>167</sup> Seventeen states have passed laws making it tougher for DUI defendants to plea bargain than it is for other defendants.<sup>168</sup>

What we have are legal trends that are simultaneously pushing to apply drunk driving laws to lower and lower levels of intoxication, fewer constitutional safeguards for drunk driving suspects, and stricter sentencing. A DUI or DWI conviction in most states can mean fines of as much as \$10,000, a six-month driver’s license suspension, and even jail time for a first offense. When one considers that a few drinks can lead to the arrest of a driver, the harsh penalties that follow a conviction, the looming presence of .08 per se, roadblocks, and the reduced protections

available to suspects, it’s easy to see how these laws, taken together, can affect the decision about having a drink on an evening out. The campaign against drunk driving is no longer a campaign against drunk driving. It has morphed into a campaign against drinking.

## **Misplaced Zeal: “You Can’t Be Drunk in a Bar”**

In December 2002 police in Fairfax County, Virginia, initiated a series of “stings” in bars and taverns in the jurisdictions of Reston and Herndon.<sup>169</sup> Eighteen tavern patrons were singled out, *while still inside the tavern*, and ordered to submit to alcohol breath tests. Half of them were then arrested for “public intoxication.” *None of the patrons had made an attempt to get behind the wheel of a car.* None had been a nuisance for bartenders or caused any type of disturbance. Several of the people arrested were actually accompanied by “designated drivers.” Police were also considering fining the bars where the intoxicated patrons were arrested.

Police Chief J. Thomas Manger told the *Washington Post*: “Public intoxication is against the law. You can’t be drunk in a bar.” When asked where someone could be drunk, he replied: “At home. Or at someone else’s home, and stay there till you’re not drunk.”<sup>170</sup> Despite the public outcry, Chief Manger got a vote of public support from NHTSA. Spokesman Chuck Hurley told the *Post*: “Nothing in the Constitution says you’re entitled to be intoxicated at these levels. These are somewhat unusual tactics. But given the facts, I support law enforcement.”<sup>171</sup>

In Waukesha County, Wisconsin, Prosecutor Paul Bucher authorized deputies to enter private residences without warrants, “by force if necessary,” if they suspected minors might be drinking inside.<sup>172</sup> Such “innovative” approaches to the underage drinking problem won Bucher a place in the “Prosecutors as Partners” honor roll on the MADD website.<sup>173</sup>

In September 2002, shortly after the *Princeton Review* named Indiana University

the top “party school” in the country, students there claimed that Bloomington police officers began arresting students for walking home from bars while intoxicated.<sup>174</sup> Students claimed to have been arrested while walking through the parking lots of apartment complexes where they lived or while waiting curbside for sober rides home. The situation worsened to the point that the Indiana University Student Association sent an official letter of complaint to the Bloomington Police Department. When asked by the *Indiana Daily Student* if he’d rather of-age, drunk students drive themselves home instead of walking, Lt. Jerry Minger said: “Alcohol abuse is the problem, not the issue of whether or not you are going to drive. Students should not be drinking to this excess.”<sup>175</sup>

One of the key policy recommendations found throughout neoprohibitionist literature calls for more stringent and more tightly enforced “public nuisance” laws, which would condone actions such as the public intoxication “stings” in Fairfax County and Bloomington. But public nuisance is only one of a host of policy objectives aimed at restricting access to alcohol that don’t involve taxes, censorship, or the draconian drinking and driving laws discussed previously. For example:

- At least 44 states have enacted some sort of “dram shop” law, which holds bars, taverns, and restaurants civilly liable for damages inflicted by intoxicated customers, even after leaving. Another 31 states have “social host” laws, which apply the same liability to occupants of private residences. Those laws seek to control the environment in which alcohol is consumed instead of focusing on the conduct of irresponsible drinkers.<sup>176</sup>
- Twenty-two states have put some sort of restrictions on “happy hour” drink specials.<sup>177</sup>
- Orange County, California, pays for a series of training seminars for bar and restaurant managers that teaches them

how to train servers to undermine alcohol sales. Servers are encouraged, for example, to decrease serving sizes of wine, to serve a customer only one drink per hour, and to make up for lost revenue in alcohol sales by selling more food.<sup>178</sup>

Another tactic used to restrict access to alcohol is to enact strict zoning and licensing laws to limit the concentration, and availability, of alcohol in certain communities. Vallejo, California, requires at least 1,000 feet between liquor outlets. In addition, the city has enacted a host of new laws that make it extremely difficult for new establishments that sell alcohol to open. The city’s Alcohol Beverage Control requires servers to pay a fee to be educated about the new laws.<sup>179</sup>

In *Body Count*, authors Bennett, DiIulio, and Walters write: “The time has come to experiment with policies aimed at cutting crime and cutting alcohol availability and consumption. The place to begin the experiment is in those poor, minority, high-crime neighborhoods where the density of liquor outlets far exceeds citywide averages.”<sup>180</sup>

In addition to banning alcohol billboards from “the horizons of schools, churches and public housing centers,” the authors also recommend new zoning laws to “increase the distance between liquor stores, reduce the total number of bars and/or liquor stores in the city, and ban the sale of malt liquor to go.”<sup>181</sup> They also recommend restricting the hours liquor can sold or served.<sup>182</sup>

There’s evidence that such recommendations are having real-world effects:

- Currently, sections of Tacoma, Washington, have banned the sale of malt liquor and fortified wine. Community activists in the Northeast quadrant of Washington, DC, are calling for similar measures.<sup>183</sup>
- Newark, New Jersey, recently increased the cost of an annual liquor license from \$600 to \$5,000 in order to fund a new beverage control program.<sup>184</sup>
- In Chicago, a city that should know a

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thing or two about the unintended consequences of prohibition, 400 of the city's 2,705 precincts have now gone dry. At least one precinct in the city has attempted to go dry in every city election since 1970.<sup>185</sup>

- In West Virginia all people under the age of 18 are required to be accompanied by a parent or guardian while inside any establishment that serves wine or liquor. That includes restaurants and concert and sporting venues—even if no one in the party intends to drink.<sup>186</sup>

Other laws and policies suggested by the neo-prohibition movement include

- limiting drink discounts and specials;
- requiring the alcohol industry to fund anti-alcohol advertisements and commercials;
- prohibiting any alcohol sales within a specified area around schools, churches, and community centers;
- restricting concurrent sales of alcohol and gasoline;
- restricting total alcohol outlets on the basis of a population ratio;
- requiring food to be sold with alcohol;
- limiting the square footage a retail outlet can devote to alcohol products;
- restricting home delivery sales of alcohol;
- requiring minimum lighting levels in bars and restaurants so staff can assess the level of intoxication of customers;
- requiring the employment of trained security guards at establishments serving alcohol;
- restricting alcohol advertising to the interior of establishments that sell alcohol;
- prohibiting the use of cartoon characters or “child-oriented images” to sell alcohol;
- limiting the percentage of store window space used for alcohol advertising;
- eliminating or restricting “single-can” sales, as well as the sale of chilled malt liquor and fortified wine;
- prohibiting the sale of screw-top wine

bottles;

- prohibiting the sale of “alcopops” and similar alcohol products that are sweet, packaged in bright colors, and might appeal to youth;
- restricting alcohol service on airplanes and in airports; and
- imposing fees on establishments that sell alcohol to cover the costs of enforcing these policies.<sup>187</sup>

Many of those policies have already been enacted at the state or local level. Others are under consideration. In 2002 U.S. Sen. Dianne Feinstein (D-CA) floated the idea of limiting alcohol service on airplanes after flight attendant unions complained of increased occurrences of “air rage.”<sup>188</sup> Given the success anti-alcohol advocates have had thus far, it's a safe bet that each of those recommendations is likely to get a trial run at some level in the next few years.

In a free society, temperance advocates can raise money, run advertisements, and generally seek to persuade people that liquor consumption is a waste of money or even a character defect. Policymakers, however, should not unleash the police force to arrest people who hold contrary views and who choose to drink liquor responsibly.

## **The Neoprohibition Movement**

Just as the 20th-century prohibition movement didn't suddenly appear out of thin air, modern temperance advocates are well-organized and well-funded and mount sophisticated public relations campaigns with specific, clearly articulated objectives.

At the heart of the modern movement is the New Jersey-based Robert Wood Johnson Foundation, a philanthropic research organization with about \$8 billion in assets (as of 2001).<sup>189</sup> Restaurant industry advocates and others have long accused the foundation of a neoprohibitionist agenda, though the foundation denies the charge.<sup>190</sup>

Robert Wood Johnson spokespeople have promoted the view that policymakers have been too lax about “alcohol-related” problems. From 1997 to 2002, the foundation gave \$265 million in grants for anti-alcohol initiatives, including grants to CASA, CAMY, CSPI, and other ventures such as Join Together Online, and the Pacific Institute for Research and Evaluation.<sup>191</sup> In the early 1980s the foundation set aside \$73.6 million for a program called Fighting Back, which aimed for “measurable reduction in the overall use of or demand for alcohol” in 14 metropolitan areas.<sup>192</sup> Among Fighting Back’s objectives: prohibiting public consumption of alcohol, closing liquor outlets in risk areas, banning liquor sales on Sunday, banning the sale of fortified wines and malt liquor in designated neighborhoods, and increasing alcohol taxes.<sup>193</sup>

Though largely a failure in the cities where it was initially attempted, Fighting Back has since focused on Vallejo, California, as its flagship program.<sup>194</sup> There, Fighting Back has persuaded the local Alcohol Beverage Control authorities to enact a host of Fighting Back initiatives. In fact, the training (and fee) mandated by Vallejo’s ABC is administrated by Fighting Back. One prospective store owner was harassed so mercilessly by ABC and Fighting Back that he agreed to shift his focus from alcohol sales to groceries and changed the name of his store from Val’s Liquor Store to Val’s Heritage Market.<sup>195</sup>

Many of the anti-alcohol studies, programs, and initiatives mentioned above were partially or fully funded by the Robert Wood Johnson Foundation or were published or undertaken by organizations partially or fully funded by it. Robert Wood Johnson is not the only organization interested in more stringent public policies, but its activities are the most hyped and have proven most influential in persuading policymakers. Here are a few examples:

- The RAND study written by Deborah Cohen was funded with about \$260,000 from the foundation.<sup>196</sup>
- The “Teen Tipplers,” “Revenues,” and

binge drinking studies were all published by CASA, an organization that received \$33 million from Robert Wood Johnson between 1991 and 2001.<sup>197</sup>

- The public opinion survey conducted by the Alcohol Epidemiology Program at the University of Minnesota was funded by Robert Wood Johnson.<sup>198</sup>
- The server training program initiated by Orange County, California, was sponsored by Robert Wood Johnson.<sup>199</sup>
- The Center for Science in the Public Interest got \$1.21 million from the foundation between 1996 and 2002.<sup>200</sup>
- MADD got \$3.39 million from 1996 to 2001.<sup>201</sup>

Often, those organizations hitchhike on the attention the others generate with a study, paper, or press release. The Center for Science in the Public Interest, for example, sent out a press release shortly after the CASA binge drinking studies, citing them as further reason to increase alcohol taxes.<sup>202</sup>

The Robert Wood Johnson Foundation even has a formal advocate in the media. *San Diego Union Tribune* columnist Jim Gogek is an official Robert Wood Johnson Foundation fellow.<sup>203</sup> His columns address alcohol policy and regularly cite studies funded by the foundation, and he has published op-eds in, among other places, the *New York Times*.<sup>204</sup>

Of course, there’s nothing wrong with a private organization advocating public policy it believes is beneficial to public health. But the Robert Wood Johnson Foundation bills itself, not as an advocacy organization, but as a public health foundation. Its publications are received by media outlets and legislators not as papers designed to further an agenda but as neutral, science-based studies. But there’s reason to be skeptical about the supposedly scientifically based publications that are underwritten by the foundation. In 2000 the Robert Wood Johnson Foundation cosponsored a conference of anti-alcohol advocates in Washington, DC, “Alcohol and Crime: Research and Practice for Prevention.” Among the bullet-pointed “Key Learnings” to emerge from the conference was this: “Research

**One prospective store owner was harassed so mercilessly that he agreed to shift his focus from alcohol sales to groceries and changed the name of his store from Val’s Liquor Store to Val’s Heritage Market.**

**The state of Florida recently considered a piece of legislation that would have increased traffic violation fines by \$50. One dollar of every fine would have gone to MADD.**

and data from community partnerships and programs to reduce underage drinking should support the goals of the partnership/program funders.”<sup>205</sup> A remarkable statement, requiring that “research and data” collected from underage drinking programs should draw conclusions consistent with the anti-alcohol movement—apparently even before the data are collected or the research done!

More troubling, however, is the overlap between the Robert Wood Johnson Foundation and the federal agencies charged with carrying out the enforcement of federal alcohol policy. The conference in Washington was cosponsored by the U.S. Department of Justice and the U.S. Department of Health and Human Services.<sup>206</sup> According to restaurant advocates at the Center for Consumer Freedom, 8 of the 12 panelists for the Institute of Medicine, which released the National Academy of Sciences report on underage drinking, have direct ties to the foundation or to organizations it funds.<sup>207</sup> Robert Wood Johnson also provides supplemental funding to the U.S. Department of Education’s Higher Education Center for Alcohol and Other Drug Prevention and to the Justice Department’s Office of Juvenile Justice and Delinquency Prevention, both of which have embraced policies that restrict consumer access to alcohol.<sup>208</sup>

Even more troubling than Robert Wood Johnson’s ties to government are those of MADD. MADD’s considerable lobbying power became apparent when the organization successfully moved Congress and President Clinton to enact .08 per se. Perhaps less known, however, are MADD’s considerable ties to the federal agencies overseeing the public policy areas MADD seeks to influence. In October 2003 *Roll Call* reported that there would be a sobriety roadblock at a Capitol Hill intersection in Washington, DC, from 10:30 p.m. to 3:30 a.m. “In addition to screening drivers, police officers will distribute information from the National Highway Traffic Safety Administration and Mothers Against Drunk Driving,” the article said.<sup>209</sup>

Many people might not find the cozy relationship between MADD and NHTSA

unnerving. But MADD is an advocacy organization, and it is becoming more apparent that not everyone agrees with the policies it advocates. The idea that NHTSA and the DOT are so closely aligned with a group that has a temperance agenda that they’re willing to distribute its literature during police operations ought to raise concerns with policy-makers and citizens. Imagine the outcry, for example, if the Department of Labor were to hand out AFL-CIO literature at an official department event.

Yet the MADD-NHTSA relationship endures. As noted previously, the organizations shared in the launch of the “You Drink, You Drive, You Lose” campaign. NHTSA administrator Jeffrey W. Runge stood alongside MADD officials at the press kickoff.<sup>210</sup>

MADD’s ties to government don’t end there:

- Part of MADD’s eight-point plan to wage war on drinking and driving calls for a \$1 billion fund for sobriety checkpoints. That fund, of course, would be administered by NHTSA, presumably with MADD’s counsel.<sup>211</sup>
- Former NHTSA chief of research and evaluation James Fell now serves on MADD’s national board of directors.<sup>212</sup>
- In 1997 NHTSA granted nearly a half million dollars to MADD and other temperance groups for the purpose of “impacting state legislative deliberation”—that is, lobbying states for .08. Rep. Billy Tauzin (R-LA) put language in NHTSA’s reauthorization bill preventing the agency from engaging in third-party lobbying.<sup>213</sup>
- In 1981 NHTSA gave MADD a federal grant for “chapter development.” Within a year, MADD expanded from 11 chapters to more than 70.<sup>214</sup>
- The state of Florida recently considered a piece of legislation that would have increased traffic violation fines by \$50. One dollar of every fine would have gone to MADD.<sup>215</sup>
- MADD has persuaded several jurisdic-

tions to require DWI offenders to attend “Victim Impact Panels,” run by MADD, at which offenders listen to victims of drunken driving. Offenders pay costs, and MADD has made as much as \$2 million annually from those panels, despite growing evidence that they fail to reduce recidivism.<sup>216</sup>

MADD is clearly wandering away from its original, *admirable* goal of preventing traffic fatalities caused by drunken drivers. Instead of declaring victory over drunken driving and downsizing its operation, MADD has sought new battles to justify its staffing and budget. The main effort nowadays is to expand the definition of “drunk” and to shift the focus of its battles from irresponsible drinkers to the “environment of alcoholism.” Charles Peña, former executive director of MADD’s Northern Virginia chapter, not only parted ways with MADD but after his departure wrote a paper that details the organization’s conversion from public safety crusader to neoprohibitionist activities.<sup>217</sup> Even MADD’s founder has expressed her regret about the direction the group is taking. Candy Lightner has said of the organization she started: “[MADD has] become far more neo-prohibitionist than I had ever wanted or envisioned. . . . I didn’t start MADD to deal with alcohol. I started MADD to deal with the issue of drunk driving.”<sup>218</sup>

## Conclusion

The word “neoprohibitionist” is strong. It conjures up images of 1920s’ gangsters, Eliot Ness, speakeasies, and the jazz age. It’s difficult to imagine that the United States could again make the colossal mistake of attempting to legislate alcohol out of American life. It’s difficult to imagine such an effort ever garnering public support. For those reasons, some people wave off the neoprohibition label as overheated rhetoric.

But restricting Americans’ access to alcohol needn’t come in the form of a constitutional amendment. Although we may never again see

alcohol formally prohibited at the federal level, it isn’t difficult to imagine the day when alcohol is prohibited in all but a few public places and private residences. Lawmakers are increasingly lending an ear to the chorus of temperance advocates calling for alcohol to be more highly priced, less available, less advertised, more regulated, and its consumers more closely scrutinized by police.

The United States has a regrettable history of suspending civil liberties and the rule of law when it comes to controlled substances, be it loopholes in the Bill of Rights carved out in drunk driving laws outlined earlier in this paper, affirmative defense protections denied to tobacco companies in civil cases,<sup>219</sup> or the plethora of civil liberties violations resulting from the country’s war on marijuana, steroids, and other drugs.<sup>220</sup> We’ve seen entire states bar the use of tobacco in public, citing public health concerns. Ten years ago it would have been inconceivable to think that a nicotine-fueled city like New York might one day go smoke free.<sup>221</sup>

It’s not entirely unreasonable, then, to think that we may one day again hear calls for alcohol prohibition. In two roadblock cases, the Supreme Court has already determined that preventing drunken driving is a more compelling state interest than illicit drugs—the Court relaxed the Fourth Amendment for the former but enforced it on the latter. City officials and anti-alcohol activists are using the same public health arguments they used against tobacco advertising in pushing for bans on alcohol advertising. Underage drinking is used as a peg for new legislation as often as underage smoking was. And whereas secondhand smoke presents unique reasons for prohibiting tobacco use in public that can’t be extended to alcohol, alcohol carries the unique drunk driving problem, which could be said to pose a more immediate and severe threat to public health than secondhand smoke. Many of the arguments already used to justify the prohibition of certain drugs and to prohibit public smoking in some areas, then, could just as easily be applied to alcohol.

**Even MADD’s founder has expressed her regret about the direction the group is taking: “I didn’t start MADD to deal with alcohol. I started MADD to deal with the issue of drunk driving.”**

It is vitally important to recall that the disastrous era of Prohibition that ended 70 years ago began with incremental steps. Policymakers and citizens ignore that history at our peril.

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